National Union of Bank Employees v Noorzeela Lamin

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NOS S-23-NCVC-14 OF 2011 AND S-23-NCVC-20 OF 2011
AMELIA TEE ABDULLAH JC
29 DECEMBER 2011

Tort — Defamation — Action against trade union members — Action taken by trade union allegedly defamed — Whether members sued could claim immunity from liability under s 22(1) of the Trade Unions Act 1959 — Whether immunity claim misconceived — Whether s 22(1) only protected member from liability if tortious act was committed on behalf of registered trade union

The plaintiff in both suits, National Union of Bank Employees ('NUBE') sued the defendants, Noorzeela Lamin and Zayuddin bin Mohamed Yusop ('the defendants') for damages for allegedly publishing defamatory remarks about the plaintiff and its national executive council members on Facebook and in a leaflet entitled 'MAYNEU Maybank Non Executive Union'. The defendants filed an application under O18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980 to strike out the two suits premised on s 22(1) of the Trade Unions Act 1959. That section stated that a suit against a registered trade union or against any members or officers of that trade union on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be entertained by any court. The defendants claimed s 22(1) afforded them immunity not only in their capacity as members of the plaintiff at the time the alleged defamation was published, but also as committee members of another trade union they subsequently became members of after leaving the plaintiff, namely, the Maybank Berhad Non-Executive Employees Union ('MAYNEU'). In addition to the immunity claim, the defendants denied having committed the alleged defamation. The plaintiff contended that the defendants' claim to immunity under s 22(1) was wholly misplaced because (i) MAYNEU was not being sued in the proceedings; (ii) it was never the defendants' case that MAYNEU had published the alleged defamation or that the defendants had published it for or on behalf of MAYNEU; (iii) MAYNEU was only registered as a trade union well after the dates on which the alleged defamation against the plaintiff was published; and (iv) since the defendants had denied committing the defamation, the question of seeking protection under s 22(1), in the same breath, did not arise.

Held, dismissing the defendants' application with costs:

(1) Although the defendants were members of the plaintiff at the material

time of the alleged tortious acts, it was ludicrous to suggest they committed those acts against the plaintiff on behalf of the plaintiff (see para 27).

(2) Section 22(1) had limited scope to protect a registered trade union and members and officers of that registered trade union in respect of tortious acts committed by that union or on behalf of that union. The defendants clearly did not come within the definition of members of NUBE committing alleged tortious acts on behalf of NUBE (see para 28).

(3) The defendants denied committing the alleged tortious acts. The court was unable to see how the defendants could then claim immunity from liability for committing those acts (see para 29).

(4) The suggestion that the defendants committed the alleged tortious acts on behalf of MAYNEU and that the s 22(1) immunity covered the statements they made on behalf of MAYNEU was totally without merit. As MAYNEU was only registered on 3 January 2011, whereas the alleged defamation was committed in 2010, the defendants could not have been members of MAYNEU as a registered trade union if it was yet to be registered as such at the material time (see paras 30–31).

[Bahasa Malaysia summary

Plaintif dalam kedua-dua tindakan, National Union of Bank Employees ('NUBE') menyaman defendan-defendan, Noorzeela Lamin dan Zayuddin bin Mohamed Yusop ('defendan-defendan') untuk ganti rugi atas dakwaan menerbitkan kata-kata fitnah mengenai plaintif dan ahli majlis eksekutif kebangsaannya di Facebook dan dalam risalah bertajuk 'MAYNEU Maybank Non Executive Union'. Defendan-defendan memfailkan permohonan di bawah A 18 k 19(1)(a), (b) dan (d) Kaedah-Kaedah Mahkamah Tinggi 1980 membatalkan kedua-dua tindakan berdasarkan s 22(1) Akta Kesatuan Sekerja 1959. Seksyen tersebut menyatakan bahawa tindakan terhadap kesatuan sekerja berdaftar atau terhadap mana-mana ahli-ahli atau pegawai-pegawai kesatuan sekerja bagi pihak mereka dan kesemua ahli-ahli lain kesatuan sekerja berkaitan apa-apa tindakan tort yang didakwa dilakukan oleh atau bagi pihak kesatuan sekerja tidak akan didengar oleh mana-mana mahkamah. Defendan-defendan mendakwa s 22(1) memberikan mereka imuniti bukan sahaja atas kapasiti mereka sebagai ahli-ahli plaintif pada masa fitnah yang didakwa diterbitkan, tetapi juga sebagai ahli jawatankuasa kesatuan sekerja lain yang mereka kemudiannya menjadi ahli selepas meninggalkan plaintif, terutamanya, Maybank Bhd Non-Executive Employees Union ('MAYNEU'). Selanjutnya selain daripada tuntutan imuniti, defendan-defendan menafikan melakukan fitnah yang didakwa tersebut. Plaintif berhujah bahawa tuntutan defendan-defendan kepada imuniti di bawah s 22(1) tersalah letak secara keseluruhannya kerana (i) MAYNEU tidak disaman dalam prosiding; (ii) ia bukan kes defendan-defendan bahawa MAYNEU telah menerbitkan fitnah

yang didakwa tersebut atau bahawa defendan-defendan telah menerbitkannya bagi pihak MAYNEU; (iii) MAYNEU hanya didaftarkan sebagai kesatuan sekerja selepas tarikh-tarikh di mana fitnah yang didakwa terhadap plaintif diterbitkan; dan (iv) memandangkan defendan-defendan telah menafikan melakukan fitnah tersebut, persoalan memohon perlindungan di bawah s 22(1), dalam hujahan yang sama, tidak berbangkit.

Diputuskan, menolak permohonan defendan-defendan dengan kos:

(1) Walaupun defendan-defendan adalah ahli-ahli plaintif pada masa tindakan-tindakan tort yang didakwa berlaku, adalah tidak munasabah untuk mencadangkan yang mereka melakukan tindakan-tindakan tersebut terhadap plaintif bagi pihak plaintif (lihat perenggan 27).

(2) Seksyen 22(1) mempunyai skop terhad untuk melindungi kesatuan sekerja berdaftar dan ahli-ahli dan pegawai-pegawai kesatuan sekerja berdaftar tersebut berkaitan tindakan-tindakan tort yang dilakukan oleh kesatuan tersebut atau bagi pihak kesatuan tersebut. Defendan-defendan jelas tidak terangkum di dalam maksud ahli-ahli NUBE melakukan tindakan-tindakan tort yang didakwa bagi pihak NUBE (lihat perenggan 28).

(3) Defendan-defendan menafikan melakukan tindakan-tindakan tort yang didakwa tersebut. Mahkamah tidak dapat melihat bagaimana defendan-defendan kemudiannya dapat menuntut imuniti daripada liabiliti melakukan tindakan-tindakan tersebut (lihat perenggan 29).

(4) Cadangan bahawa defendan-defendan melakukan tindakan-tindakan tort yang didakwa bagi pihak MAYNEU dan bahawa s 22(1) imuniti melindungi penyataan-penyataan yang dibuat mereka bagi pihak MAYNEU secara keseluruhannya tidak bermerit. Memandangkan MAYNEU hanya didaftarkan pada 3 Januari 2011, sementara fitnah yang didakwa tersebut dilakukan pada 2010, defendan-defendan tidak mungkin menjadi ahli-ahli MAYNEU sebagai kesatuan sekerja berdaftar jika ia bukan lagi didaftarkan sedemikian pada masa material (lihat perenggan 30–31).]

Notes

For a case on action against trade union, see 12 *Mallal's Digest* (4th Ed, 2011 Reissue) para 328.

Cases referred to

Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

National Union of Plantation Workers & Ors v Abdul Hamid [1963] MLJ 78, CA (refd)

National Union of Plantation Workers, The v K Annamalai [1959] MLJ 9, CA (refd)
Malayan Banking Bhd v National Union of Bank Employees & Anor (23 NCVC–37 of 2011) (refd)

Legislation referred to

Rules of the High Court 1980 O18 r 19(1)(a), (b), (d), O25
Trade Unions Act 1959 s 22(1)
Trade Unions Enactment 1940 s 21, 21(1)
Trade Unions Ordinance 1959

Alex De Silva (Vinesh M Varghese with him) (Bodipalar Ponnudurai De Silva) for the plaintiffs.
Cantius Leo Camoens (C Leo Camoens) for the defendants.

Amelia Tee Abdullah JC:

ENCLOSURE 23

[1] The defendants in S-23NCVC-14 of 2011 and S-23NCVC-20 of 2011 are *Noorzeela bt Lamin* ('the first defendant') and *Zayuddin bin Mohamed Yusof* ('the second defendant') respectively. The plaintiff in both suits is the *National Union of Bank Employees*. The plaintiff's claim against the defendants is for, inter alia, general and aggravated damages arising out of the publication by the defendants of alleged defamatory comments against the plaintiff and the plaintiff's National Executive Council members on facebook and in a leaflet entitled 'MAYNEU Maybank Non Executive Union'.

[2] In the course of the hearing and after two witnesses had already been heard, learned counsel for the defendants had suddenly sought to raise an issue about the court's jurisdiction to hear the cases. When questioned as to why this was only being raised at this late stage, counsel had offered the explanation that his attention was only drawn to this after a recent decision of the High Court where VT Singham J had, in a defamation suit against the National Union of Bank Employees ('NUBE'), held on 24 November 2011 that NUBE had immunity and the suit against it was struck off with costs of RM15,000.

[3] Counsel had submitted that by reason of the decision of the FM Court of Appeal in the case of *The National Union of Plantation Workers v K Annamalai* [1959] MLJ 9 which held that such a suit shall not be entertained in any court, the jurisdiction of this court would effectively be removed.

[4] In light of this stand taken by the defendants, the court had directed that a formal application for striking out be made before the court would make a ruling thereon.

[5] Vide a summons in chambers dated 5 December 2011, the defendants had applied to strike out the plaintiff's writ of summons and statement of claim under O18 r 19(1)(a), (b) and (d) of the Rules of the High Court 1980.

[6] The relevant portions of O 18 r 19 of the Rules of the High Court 1980 read as follows:

> 19(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement, of any writ in the action, or anything in any pleading or in the indorsement, on the ground —
>
> (a) it discloses no reasonable cause of action or defence, as the case may be; or
>
> (b) it is scandalous, frivolous or vexatious; or
>
> (c) …
>
> (d) it is otherwise an abuse of the process of the Court;
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

[7] The basis for the application is founded on s 22(1) of the Trade Unions Act 1959 which affords immunity against liability in respect of tortious acts to a registered trade union and members of the registered trade union in respect of tortious acts alleged to have been committed by or on behalf of the trade union.

[8] In her affidavit in support of the application ('encl 24'), the first defendant has averred that s 22(1) of the Trade Unions Act 1959 affords her immunity as a member of the plaintiff. Although she denies publication of the offending leaflet, she has nevertheless claimed immunity in light of the protection afforded by that section. She admits that she was a member of the plaintiff at the time that the offending leaflet was published but has since been expelled from the plaintiff with effect from 10 December 2010. She is now an executive committee member of *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd* ('MAYNEU') which was registered on 3 January 2011. As a committee member of MAYNEU, she further claims immunity in respect of tortious ads committed against the plaintiff although in the same breath she denies committing such tortious ads.

[9] In his affidavit in support of the application ('encl 20'), the second defendant has also averred that s 22(1) of the Trade Unions Act 1959 affords him immunity as a member of the plaintiff. He too has denied publication of the offending leaflet but has nevertheless claimed immunity in light of the

protection afforded by that section. He claims to be executive committee member of *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd* ('MAYNEU') which was registered on 3 January 2011. As a committee member of MAYNEU, he too daims immunity in respect of tortious acts (which he denies doing) committed against the plaintiff.

[10] Sandagran Solomon s/o Joseph Pitchay, the plaintiff's general secretary, has affirmed an affidavit in reply ('encl 25') in which he avers that he has been advised that the defendants cannot avail themselves of the statutory protection afforded by s 22(1) of the Trade Unions Act 1959 because:

(a) MAYNEU, the trade union of which the defendants are members, is not being sued in these proceedings;

(b) the defendants have not claimed that the offending leaflets were made or published by MAYNEU or themselves for or on behalf of MAYNEU since they have denied publishing the said leaflets; and

(c) MAYNEU was only registered on 3 January 2011 whereas the distribution of the defamatory leaflets by the defendants and the publication of the defamatory comments on facebook by the first defendant occurred in December 2010. As such, the defendants are not entitled to retrospective protection from s 22(1) of the Trade Unions Act 1959.

[11] Solomon avers that the plaintiff had issued a show cause letter to the first defendant to explain her action in planning to establish an in-house union within Maybank when she was a member of the plaintiff and fully aware that the collective agreement between the plaintiff and Maybank prohibited the forming of any other union for the clerical and non-clerical employees of Maybank. The membership of the first defendant was terminated when she failed to respond to the show cause letter issued by the plaintiff.

THE DEFENDANTS' SUBMISSIONS

[12] The defendants' striking out application is premised on s 22(1) of the Trade Unions Act 1959. Section 22(1) reads as follows:

> 22.(1) A suit against a registered trade union or against any members or officers thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be entertained by any court.

[13] The defendants submit that the plaintiff's claim against them is based on an alleged defamatory publication about the plaintiff published or caused to be published between 3 December 2010 and 5 December 2010. At the time of

the alleged publication, both defendants were members of the plaintiff. The first defendant was expelled on 13 December 2010 but there is no record of the second defendant ever being expelled.

[14] The defendants contend that since they are members of the plaintiff at the time the alleged defamation was committed, they are immune from any action in respect of the alleged defamation.

[15] The defendants rely on two authorities in support of their contention. In the case of *The National Union of Plantation Workers v K Annamalai* [1959] MLJ 9, the Court of Appeal upheld the immunity of trade unions relying on s 21(1) of the Trade Unions Enactment 1940. Section 21(1) of the Enactment is identical to s 22(1) of the Trade Unions Act 1959. In that case, the appellant which was a registered trade union was sued as the publisher and owner of a magazine entitled 'Sangamani'. The respondent was the hon secretary of another trade union. The respondent had alleged that the 1 June 1956 issue of 'Sangamani' had published certain defamatory statements relating to the respondent. The respondent commenced proceedings in libel against the editor and the Union as the publishers and owners of the publication. The appellant took out a summons to have themselves struck out as defendant on the grounds that the action against them was not competent by reason of s 21(1) of the Trade Unions Enactment 1940. The application was dismissed by Sutherland J. On appeal, the Court of Appeal, by a majority, allowed the appeal with costs.

[16] In the case of *National Union of Plantation Workers & Ors v Abdul Hamid* [1963] MLJ 78 the third appellant, as the agent and servant of the first appellant, had published in a newspaper known as the 'Sangamani' certain matters defamatory of the respondent. The newspaper was published at Sangamani Press which was the property of the first appellant. The respondent issued a writ for libel against the first appellant, the 'Sangamani Press', the nominee and Perumal, the second and third appellants respectively. The appellants applied under O 25 for the action to be struck out on the ground that it was incompetent. The learned judge dismissed the application. On appeal, the Court of Appeal held that under the provisions of the Trade Unions Ordinance 1959, a trade union is liable to be sued for torts arising from ownership of property but not otherwise. The liability in this case arose from the relationship of master and servant and not from ownership of property and therefore the first appellant was not liable to be sued.

[17] It is submitted by the defendants that the immunity granted to trade unions in s 22(1) extends to members and officers of any trade union by virtue

of the words 'or against any members or officers thereof'. The defendants thus contend that they are immune by virtue of the fact that they were members of the plaintiff.

[18] It was also submitted that at the time that the suits were filed in March 2011, the defendants were executive committee members of MAYNEU and as such they were further protected by immunity from being sued for the tort of defamation.

THE PLAINTIFF'S SUBMISSIONS

[19] In response, the plaintiff submits that the leaflets distributed by the defendants as well as the facebook comments posted by the first defendant were defamatory of the plaintiff.

[20] Section 22(1) of the Trade Unions Act 1959 only provides immunity to members and/or officers of trade unions for acts committed by or on behalf of the trade union. However, in this case, the defendants are not contending that the leaflets were published by MAYNEU or by them on behalf of MAYNEU. Rather, the defendants have even denied distributing the leaflets or posting the facebook comments. As such, the plaintiff contends that the defendants' actions do not fall within the ambit of s 22(1) of the Trade Unions Act 1959.

[21] The plaintiff further submits that since MAYNEU in which the defendants are members is not being sued, s 22(1) of the Trade Unions Act 1959 does not apply.

[22] Learned counsel for the plaintiff has submitted that in the case of *The National Union of Plantation Workers v K Annamalai*, it was a registered trade union that was being sued for the publication of defamatory statements in the trade union's magazine. What was held was that a trade union cannot be sued for libel pursuant to s 21 of the Trade Unions Enactment 1940 which is in pari materia with s 22(1) of the Trade Unions Act 1959.

[23] In the case of *National Union of Plantation Workers & Ors v Abdul Hamid*, again it was a registered trade union that was being sued for the publication of defamatory statements in the trade union's newspaper. Whilst the Court of Appeal held that the trade union could not be held liable for the tort of libel, it also held that the provisions of the Trade Unions Ordinance did not confer statutory protection from liability for tortious acts on the individual who published the newspaper on behalf of the trade union.

[24] As such, the plaintiff submits that the statutory immunity conferred by

s 22(1) of the Trade Unions Act 1959 serves only to protect registered trade unions or acts committed by members of a registered trade union on its behalf. The plaintiff thus submits that on the current facts, the defendants cannot rely on s 22(1).

[25] Reference was also made to the decision of VT Singham J in *Malayan Banking Bhd v National Union of Bank Employees & Anor* (23NCVC-37 of 2011) where the case against the National Union of Bank Employees (NUBE) and its general secretary was successfully struck out on the grounds of statutory immunity. In that case, the publication of the alleged defamatory statements was never denied. However, it was pleaded that the general secretary had published the alleged defamatory statements on behalf of NUBE and thus the publication of the defamatory statements came within the ambit of s 22(1) of the Trade Unions Act 1959. It was submitted that the facts of the case in Malayan Banking Bhd above is different from the facts of our instant case and thus will not be of assistance to the defendants.

FINDINGS AND CONCLUSION

[26] It is obvious that the decision of the court in this striking out application will depend on a proper construction of s 22(1) of the Trade Unions Act 1959. The court finds the words in section 22(1) to be clear and unambiguous. The immunity afforded in this subsection is only in respect of a suit against:

(a) a registered trade union; or

(b) any members or officers of that trade union on behalf of themselves and all other members of the trade union,

in respect of any tortious act alleged to have been committed by or on behalf of the trade union. In other words, there is a qualification that the tortious acts complained of must have been committed by the member or members on behalf of the trade union.

[27] It is obvious that the defendants are not a registered trade union. Although the defendants were members of NUBE at the material time of the alleged tortious acts, however it cannot be seriously suggested that the defendants were committing the alleged tortious acts against NUBE on behalf of NUBE. Put in that context, the court finds this argument to be ludicrous in the extreme.

[28] It must be borne in mind that this immunity afforded by s 22(1) is not an all-encompassing blanket immunity. It has a limited scope to protect a registered trade union and members and officers of that registered trade union in respect of tortious acts committed by that union *or on behalf of that union.*

The defendants clearly do not come within the definition of members of NUBE committing alleged tortious acts on behalf of NUBE.

[29] The court must also note in passing that the defendants have both denied committing the alleged tortious acts. The court is unable to see how the defendants can make a claim for immunity from liability in respect of alleged tortious acts if they are denying the making of the alleged tortious acts.

[30] There is also a suggestion that at the time when the defendants committed the alleged tortious acts, they were doing it on behalf of MAYNEU and that the s 22(1) immunity covers the statements that they made on behalf of MAYNEU.

[31] The court finds this submission to be totally without merit. It is an undisputed fact that MAYNEU was only registered on 3 January 2011 whereas all the alleged defamatory acts and statements were committed and published in 2010, before the very formation of MAYNEU. The court finds that the defendants cannot gain the protection of s 22(1) on this score because at the material time of the commission and making of the defamatory acts and statements, MAYNEU was not a *registered* trade union. Similarly, the defendants could not have been members of a registered trade union if MAYNEU was yet to be registered as a trade union. It follows there from that any tortious acts committed by the defendants, even if the acts were alleged to be committed on behalf of MAYNEU would still not afford them protection since at the material time MAYNEU had yet to be registered.

[32] The court finds that the facts of the case in *Malayan Banking Bhd v National Union of Bank Employees & Anor* as decided by VT Singham to be quite different from the facts of our instant case. In that case it was NUBE and the Secretary General of NUBE who were being sued. And the suit against them was struck out because it was pleaded that the secretary general was making the defamatory statements on behalf of NUBE.

[33] In coming to a decision as regards this application, the court has taken note of the principles of law in relation to striking out applications. In the case of *Bandar Builders Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7. His Lordship Mohamed Dzaiddin bin Hj Abdullah SCJ had stated as follows:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) Rules of the High Court are well settled. It is only in plain and obvious cases that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck v Wilkinson* [1899] 1 QB 86, at p 91), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' (*Attorney-General of*

Duchy of Lancaster v L & NW Ry Co [1892] 3 Ch 274 (CA)). It cannot be exercised by a minute examination of the documents and facts of the case, in order to see whether the party has a cause of action or a defence (*Wenlock v Moloney* [1965] 1 WLR 1238; [1965] 2 All ER 871 (CA))…

… It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (*Moore v Lawson* [1915] 31 TLR 418 (CA)); (*Wenlock v Moloney*).

[34] The court has considered the application made in this case and the statement of claim that has been filed by the plaintiff. In light of the court's finding that s 22(1) of the Trade Unions Act 1959 does not afford the defendants any immunity from being sued in respect of the tortious acts committed by them, the court finds that the defendants' application to strike out the writ and statement of claim against them must necessarily fail. The court finds that the defendants have not shown that the plaintiff's claim discloses no reasonable cause of action or that it is scandalous, frivolous or vexatious or is otherwise an abuse of the process of the court. As such, the court has no hesitation in dismissing the defendants' application for striking out with costs to be taxed and paid forthwith.

Defendants' application dismissed with costs.

Reported by Ashok Kumar